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No. 95-897

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

FRANCIS BERNARD AUER, *et al.*,
Petitioners,

v.

DAVID A. ROBBINS, *et al.*,
Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

The Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, ("FLSA"), sets a maximum hours standard for law enforcement at 171 hours in a 28 day period, 29 U.S.C. § 207(k). The Secretary of Labor defines and delimits FLSA "white collar" exemptions, 29 U.S.C. § 213(a)(1), so as to require compensation on a salary basis, 29 C.F.R. § 541.5d and 118(a).* The questions presented involve the application of the salary basis test in public employment, specifically—

1. Are all public employees, who *as a practical matter* are subject to non-safety disciplinary suspension for less than a full pay period, non-exempt, or are only those who actually suffer deductions non-exempt? and

2. Is a "window of correction" open to a public agency which simply amends one impermissible provision in a disciplinary code without (a) proving inadvertence, (b) revoking all impermissible authorization of deductions, and (c) restoring the lost compensation immediately upon discovery?

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* In 1974, the FLSA maximum hours standard was extended beyond the general 40 hour week by Congress to meet the special hours of work needs of law enforcement. In 1985 after this Court's decision in *Garcia v. San Antonio Transit*, 469 U.S. 528 (1985), which overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), and restored an hours of work standard to state and local public safety agencies, Congress and the DOL further adjusted the public sector rules to allow compensatory time, to provide a protected compliance period, and otherwise to accommodate the public sector. *See* the FLSA Amendments of 1985, P.L. 99-150, 99 Stat. 790 (1985); and DOL's public sector rules, 52 Fed. Reg. 2032 (1987), 29 C.F.R. Part 553. Finally, in 1992, the salary basis test was tailored to "principles of public accountability" by a "special provision applicable to employees of public agencies." 57 Fed. Reg. 37666 (1992), Pet. App. at 184a; 29 C.F.R. § 541.5d.

PARTIES TO THE PROCEEDINGS BELOW

The Plaintiffs in the District Court include Francis Auer, Christopher Day and James Hill, all sergeants in the St. Louis Police Department, and 286 additional similarly situated Plaintiffs, including one lieutenant, Manuel Delgado, who are listed in the footnote which follows. All of the Plaintiffs were Appellants/Cross Ap-

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** Francis Bernard Auer; Christopher James Day; James Gilbert Hall; Francis B. Corona; Anthony Pona; Michael T. Indelicato; Richard Buehler; James E. Long; Roy Burgdorf; Donald Swanson; Lionel Abernathy; Kenneth Ackerman; Alfred Adkins; Duane Alexander; Steve W. Alsup; Roger Amelung; James Anderson; Michael Anderson; Edward L. Atherton; Roosevelt Barnes, Jr,; Vernon Barton; Richard C. Bartram; Lee Bates; Darrel Battle; Robert D. Bayless; Michael Beck; Dennis Becker; Joseph D. Beffa; Chris Beffa; Michael Bergman; John Billings; Michael Blanks; Leonard Bober; Donald L. Bohnert; Robert L. Bonzon; Frank Booker; Fred Boyd; Kenneth M. Bradshaw; Robert Brennan; Joseph Burgoon; John M. Burke; Thomas Burke; Jay Burkhard; Shadrach J. Burks; Al Carter; Michael Caruso; Salvatore Chrum; Earl Cobb; Walter Collier; Donald Columbo; Clarence Contestabile; Phillip P. Cornish; Don Cumings; Stanley Cunningham; Gordon Curd; Thomas J. Daley; Jerome Dampier; Robert Davis; Steve Debisschop; Robert Decker; Manuel Delgado; Edward S. Dickerson; Leman Dobbins; Jerry Dodson; James M. Doggendorf; Stephen Dougherty; Robert Downey; Robert J. Duffin; Daniel Duffy; Judith Dupius; Jimmie Lee Eads; Donald Ebner; Thomas Eckhard; Carl Edwards; Robert E. Farrell; Lawrence Flowers; Jackie Fowler; Leonard G. Forsting; Lynn D. Fox; Tommy Franklin; Michael Frederick; Nick Frederickson; Donald M. Frentzel; Bob Gavin; Robert George; Raymond L. Ghrist; Wilkie Glasener; James Glasscock; Thomas Godfrey; William Gooden; Joel Grant; Edward V. Graves; Darla Gray; Jesse Green; John D. Green; Robert C. Griffin, III; Ward Griggs; Wilburn Grove; Mike Guzy; Dennis Hahn; Kenneth Hahn; Arthur Hammer; Adolphus Hardy, Jr.; Donald Hardy; Steven Harmon; Ralph Harper; Edward Harper; Peggy Harris; Reggie Harris; Henry G. Harris; Gregory Hawkins; Mark Helmholt; Donald Henderson; Ronald Henderson; Leo Hertling; Stephen Hobbs; Susan Hobbs; Joseph Hoeing; Andrew Hollins; Jack W. Huelsmann; Jack Huesgen; Lloyd Huggans; Riley L. Hughes, Jr.; Edmund Ronald Jablonski; Michael Jarvis; Roy Joachimstaler; Cletus Johnson; Joe W. Johnson; John Johnson; Michael Jones; Milton Jones; Richard

pellees before the United States Court of Appeals for the Eighth Circuit. The Defendants and Appellees/Cross Appellants included David Robbins, Member of the St. Louis

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Jones; Robert W. Jones; Rochelle Jones; Terry Kaelin; David E. Kassebaum; John Kavadas; Elmer Kavanaugh; Kenneth Kegel; Guinn Kelly; Genevieve Kelly; David Keough; Ronald R. Klein; Ronald Klier; Robert Klinger; Jerome Klipfel; Howard Klocke; Rodger G. Kohler; Gus Kolilis; Jeffrey Kowalski; Judith A. Kramer; Joseph Kriska; Robert Kruger; John P. Kuelker; Gary Kukla; Edward Kuntz; William Kusmec; Norman Land; William Landrum; Michael L. Lauer; Thomas Leassner; Frank Lebeau; Audrey L. Lee; Leo Lewis; Joseph Lievin, Jr.; Larry Dean Liggett; J.W. Loftin; Jim E. Long; Jim H. Long; Edward Longinetti; Donna Love; Dave Lowell; Michael Lowry; Edward Lynch; Anthonette Madison; Edward Magee; Thomas J. Magnan; Warren Malugen; Joseph Marcinkiewicz, Jr.; Charles Marvin; Philip F. Maugeri; Clyde McCandless; Michael McCraw; William McCuller; Joseph McCulloch; Joe McDermott; Tim McDonough; George McDonough; Timothy McEntee; John McKenzie; Edward Messmer; Charles Metzner; Stanley Mierzejewski; Eugene Milne; Preston Moore; Richard Moore; James Moran; John J. Moriarty; Pat Morici; Bert Morris; Marlin Mueller; Gerard D. Murphy; Timothy Murphy; Joseph Murphy; Francis J. Meyers; Albert Napier; Paul Neudecker; Worthy Newsom; Daniel Nichols; John R. Nieman; Tom Niemeyer; Beverly Noble-Barnes; Leroy Nunally; Lawrence O'Toole; Dennis Oberdieck; Steve Olish; Ron Owensby; John Page; Manson Parks; Robert Piekutowski; John P. Podolak; Gary Poelling; Dennis Pollihan; William Priest; Joseph Priest; Billy Qualls; Dan Rechtien; Abraham Reddick; Joe Reynolds; Anthony Rice; Jack Eugene Richards; Larry Richards; Jacob D. Richardson; Herbert L. Riley; James Riordan; Simon J. Risk; Louis Rizzuti; Joseph Robinson; Michael T. Roe; Thomas L. Roth; John Roussin; Arthur Ruehl; Anthony Russo; Daniel Saitz; John Salamone; Thomas L. Saliba; Ronald Sanneman; Dana Saunders; John L. Saylor, Jr.; Charles Schaeffer; Robert Scheetz, Jr.; Jon S. Schickedanz; Gary A. Schubert; Timm Seithel; Raymond Sheehan; Michael Siemers; Samuel J. Simon; Daniel G. Simpher; Richard Simpher; Joseph B. Sims; Terrance Sloan; Russell F. Smith; Eugene Smith; Gwen Spicer; Charles Steele; Vincent R. Stehlin; Paul E. Steinart; William Stevenson, Jr.; Daniel C. Stewart; Paul Stewart; James J. Stika; Donald Storie; Richard Suzy, William G. Swiderski; Gregory Tayborn; John Taylor; Fred Turner; Herman Ubben; George Venegoni; Michael Vierling; Donald

Board of Police Commissioners and its acting President and the other members of that Board—Rita M. Kropf, James F. Conway, Charles Mischeaux, and Freeman Bosley, or their predecessors on the St. Louis Board of Police Commissioners.

Volmert; James Walker; James Walsh; John Walsh; Joseph E. Walsh; Russell Whitener; Dwight D. Wideman; Michael Williams; Rodney Williams; Warren Williams John G. Wondracheck; James Wurm; Robert Zambo, Jr.; Thomas E. Zipf.

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Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR PETITIONERS

St. Louis Police sergeant Francis Auer, *et al.*, the Plaintiffs in the District Court for the Eastern District of Missouri, Eastern Division and the Appellees/Cross Appellants in the Eighth Circuit Court of Appeals, request this Court to reverse the judgment of the United States Court of Appeals for the Eighth Circuit in *Francis Bernard Auer, et al. v. David A. Robbins, et al.*, 65 F.3d 702 (8th Cir. 1995).

OPINIONS BELOW

The Court of Appeals opinion is reported at 65 F.3d 702 (8th Cir. 1995) and is reproduced as Appendix A in a separately bound Appendix to the *certiorari* petition (hereinafter "Pet. App."). (Pet. App. 1a-35a).

The District Court for the Eastern District of Missouri's memoranda and orders dated October 31, 1991, and April 22, 1994, are unreported and are reproduced as Appendices B, C, D, and E. (Pet. App. 36a-74a). The District Court's final judgment dated August 26, 1994 is unpublished and is reproduced as Appendix D. (Pet. App. 67a-68a).

JURISDICTIONAL STATEMENT

The Court of Appeals' opinion and judgment were entered on September 8, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). No petitions for rehearing or hearing *en banc* were filed. This Court granted *certiorari* on June 24, 1996.

STATUTES AND REGULATIONS

Section 213(a)(1) covering exemptions from the Fair Labor Standards Act (hereafter "FLSA"), 29 U.S.C. § 213(a)(1), is reproduced as Appendix F. (Pet. App. 75a).

The Secretary of Labor's FLSA regulations set out at 29 C.F.R. § 541.1 (the executive exemption rule), § 541.2 (the administrative exemption rule), § 541.118 (the salary basis rule), § 541.118(a)(5) (the non-safety related disciplinary pay docking rule), § 541.118(a)(6) (the "window of correction" rule), and § 541.5d (the special salary basis rule applicable to employees of public agencies) and 56 Fed. Reg. 45824 and 45828 (notices of rule making relating to 29 C.F.R. § 541.5d) are reproduced in Appendix F. (Pet. App. 76a-101a).[1] The final

[1] This Court designates as "legislative regulations" those regulations that are issued pursuant to "an express delegation of authority to [an] agency to elucidate a specific provision of [a] statute by regulations." *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984).

The FLSA contains in 29 U.S.C. § 213(a)(1) such an express delegation to the Department of Labor to define "executive, professional and administrative employees." The regulations set forth in 29 C.F.R. § 541.1-2 and § 541.5d are clearly such legislative regulations. 29 C.F.R. Part 541A of the FLSA exemption regulations are headed "General Regulations" and are generally designated the "legislative" regulations under the Act; DOL's "interpretations" of the "general" or "legislative" regulations in 29 C.F.R. Part 541A are set forth in 29 C.F.R. Part 541B. The discussion of the "salary basis" test in § 541.118 is contained in the Code of Federal Regulations within those sections of Part 541B headed "interpretations." However, unlike some of the 541B interpretations, § 541.118 is expressly incorporated into the "legislative" regulations of 541A through § 541.5d which limits reliance on its public sector modification of the salary basis pay docking rules to a "Federal, State or local government employee who otherwise meets the requirements of § 541.118."

rule in 29 C.F.R. § 541.5d was published with DOL's comments on the salary basis test in the public sector and the disciplinary docking rule in 57 Fed. Reg. 37666 (August 19, 1992) and is reproduced in Appendix K. (Pet. App. 184a-216a).

A complete listing of relevant regulatory entries from the *Federal Register* is set forth in Appendix A to this brief.

STATEMENT OF THE CASE

The FLSA, provides a "white collar" exemption for "executive, administrative, and professional employees" "as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]." *See* FLSA § 13(a)(1), 29 U.S.C. § 213(a)(1). (Pet. App. 75a). The regulatory pre-conditions to exempt status include two tests: a duties test and a salary basis test. An employer has the burden of establishing that an employee fulfills the requirements of both the duties and the salary basis test prior to exempting that employee from the FLSA's minimum wage and overtime at time and one half rules. *See*, 29 C.F.R. § 541.1 and § 541.2.[2] (Pet. App. 76a-80a).

[2] The basic two test approach has been in place since 1940. 5 Fed. Reg. 4077 (1940), §§ 541.1(e), 2(a) and 3(b). In 1949, the DOL amended the regulations. Since that time the salary basis test has been in force. *See*, 29 Fed. Reg. 7730, 7735 (1949). In

A special rule with regard to the application of the salary test to public employees allows exempt public employees to be subject to part-day docking for absences for personal reasons of less than one day *but* disallows rules making public employees subject to non-safety related disciplinary pay docking in an FLSA pay period.[3] *See*, 29

1954, DOL published the salary basis test, including the disciplinary docking rule, 29 C.F.R. § 541.118(a)(5), in its current form. *See*, 19 Fed. Reg. 4405, 4406 (1954). Finally, effective September 18, 1991, the salary basis test was amended by adding § 541.5d with regard to public employees to provide that so long as a public employee *otherwise meets the salary basis requirements of § 541.118*, the employee would not be disqualified as exempt on the basis that the employee's pay is subject to docking for part day absences. *See*, 56 Fed. Reg. 45824 and 45828 and 57 Fed. Reg. 37666. *See*, also Appendix A.

[3] There has been a great deal of litigation about the meaning and application of the "subject to" language in 29 C.F.R. § 541.118(a). The litigation arises both under the "subject to" docking for missing part of a day for personal reasons rule, in § 541.118(a)(1)(2) and (3), and the "subject to" non-safety disciplinary pay docking for less than a full work period rule, in § 541.118(a)(5). The two situations are different in four ways.

First, the general "subject to" part day docking rules apply only to private sector employees. When the Department of Labor invited comment on all of the 29 C.F.R. Part 541 exemption rules in 1985-1986, comments were received on nearly every aspect of the rules from the "sorely out of date" salary *level* to specific exemptions in the newspaper industry. However, no controversy was raised concerning the salary basis test. *See*, 52 Fed. Reg. 2032 (1987). After aggressive private enforceemnt in the public sector generated *Abshire v. Kern County*, 908 F.2d 483 (9th Cir. 1990), *cert. denied* 498 U.S. 1068 (1991), pay docking became controversial. The "part day docking rule" became particularly controversial in the public sector. In 1992 the Department of Labor found that "principles of public accountability" justified removing the "part day/personal absences" test from the public sector and amended § 541.118(a) by adding subsection 5d. The DOL also found that the "principles of public accountability" did not apply to disciplinary docking. 57 Fed. Reg. 37666 (1992).

Second *in a practical*, sense, docking for missing part of a day for personal reasons and disciplinary docking are quite different. An employer who has a policy of letting employees absent themselves for personal business expects the policy to be used and the work place to become "flexible." An employer who adopts a disciplinary docking code, does so precisely with the hope that it will control the activities of employees and, thereby, be unnecessary to enforce.

C.F.R. § 541.5d and § 541.118(a)(5); and 57 Fed. Reg. 37673-37674. (Pet. App. F, 82a, 85a and Pet. App. K, 184a).[4]

Third, it makes some sense to ask whether rules excusing personal absences for part of a day are "mandatory" or "permissive." Obviously only a rule that *mandates* pay for such absences would protect employees. On the other hand, the same inquiry is foolish with regard to discipline. A rule that "mandates" discipline rather than one making employees "subject to" it may restrict employer discretion but it *does* not avoid making an employee's pay conditional. The very principle of the disciplinarian's power over his or her charges, which makes the disciplinary rule test a good surrogate for testing "white collar" exemptions, means that the supervisor will always have the discretion whether and what discipline to impose. It is the "subject to" rule which is intended to control employee conduct.

Fourth, a search for some evidence of *actual* deductions might make sense in the personal absence context. Every work place, every worker, experiences occasional needs to be absent for personal reason. Therefore, if no one in a work place has ever lost a penny for personal absences, an investigator might suspiciously ask if there is really a rule which limits such absences. However, the burden being on the employer, it would be equally unbelievable were the employer unable to show multiple instances of work days when employees received their full pay for very little work, that is, an employer should be made to prove the employees get a full day's pay even for a small part of a full days work. Again, on the other hand, however, the situation with regard to disciplinary docking would be wholly different. Many employees work their whole lives conscientiously adhering to the employer's work place rules precisely to avoid discipline. There is nothing odd about the worker who is subject to a strict disciplinary code walking the straight and narrow and thus avoiding discipline.

In reviewing the many decisions concerning 29 C.F.R. 541.118(a)'s salary docking rules, it is important that all of these practical matters be given attention.

[4] The DOL's publication of the final revised rule now in § 541.5d discussed commenters' suggestions that § 541.118(a)(5) be repealed

A "window of correction" rule provides that "where a deduction not permitted . . . is inadvertent, or is made for reasons other than lack of work, the exemption will not be lost *if the employer reimburses the employee for such deductions and promises to comply in the future.*" *See*, 29 C.F.R. § 541.118(a)(6). (emphasis added) (Pet. App. 82a).

The St. Louis Police Board is the employer of all of the Petitioners, for all relevant periods, as police sergeants and, in one case, as a lieutenant within the meaning of 29 U.S.C. § 203(d). (Joint Appendix at 13) (hereafter "J.A."). The Department treats the Petitioners as exempt employees under the FLSA and does not pay them time and one half compensation for any work in excess of the 29 U.S.C. § 207(k) 171 hour/28 day trigger which, in order to accommodate the special needs of law enforcement, sets the law enforcement overtime trigger 11 hours per 28 days above the general 40 hour work week. *See*, 48 Fed. Reg. 40518 (1981); and 29 C.F.R. § 553.200 to § 553.230.

The issues before the Court involve the application of the national law enforcement maximum hours of work standard, 29 U.S.C. § 207(k), and its salary basis test for exemptions from that standard, to 289 police Sergeants and Lieutenants in the St. Louis Police Department.

Procedural History. The application of the salary basis test to these petitioners involved a complicated procedural history. The complaint was filed October 25, 1988, by

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to allow non-safety related disciplinary deductions from public employees' pay. The DOL considered and rejected the suggestions. The final revisions left the salary basis test in place in the public sector although modified from the private sector rule, to allow pay docking for part day absences. The provision against non-safety disciplinary deductions in any work period in which the public employee had FLSA work time was preserved in 29 C.F.R. § 541.118(a)(5) (Pet. App. 209a-211a).

three St. Louis Police Sergeants. On January 18, 1989, eleven additional Sergeants and Lieutenant Manual Delgado were added.

The case was bifurcated for purposes of discovery and trial on February 21, 1990—creating a situation in which an initial Stage I determination of liability (whether the Police Board properly applied the DOL regulations on exemptions) would be completed before discovery on the detailed application of those rules to all plaintiffs, which would be addressed in a Stage II proceeding.

On October 30, 1991, the district court granted summary judgment concerning Lieutenant Delgado, finding that Delgado was a salaried, and not an hourly, employee, and that his duties were exempt. (Pet. App. at 68a *et seq.*). The salary basis portion of the ruling focused on the "part day docking" rule which was contemporaneously abandoned by the Department of Labor with regard to agencies in which such docking is "required." (Pet. App. 85a).[5]

The court refused summary judgement with regard to the Sergeants who were then plaintiffs without comment on the application of the salary basis test to them.

With regard to Lt. Delgado, the court focused on docking for "part of a day" without a record of actual docking and was not persuaded by plaintiffs' "first argument in this regard because this kind of activity relates to possible discipline action that could be taken if plaintiff Delgado was

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[5] Judge Cahill's ruling came immediately after the DOL's September 1991 interim revision of the applicable regulation which added 29 C.F.R. § 541.5d (56 Fed. Reg. 45824 (September, 1991), Pet. App. 86a *et seq.* *See also*, 57 Fed. Reg. 37666 (August 19, 1992)). The district court did not apply or otherwise comment on the new rule but, after expressing concern about the financial condition of the City of St. Louis and the paramilitary nature of law enforcement, applied a "part day" docking principle seemingly consistent with it. (Pet. App. at 68a-69a). *But compare* n.9, *below*.

absent without leave."[6] The court also rejected Delgado's argument that factors such as shift differential, compensatory time for overtime work and recreational days computed, for salary purposes, into hourly equivalents evidenced his hourly status. The court found that Delgado was salaried. All of this was on the basis of Plaintiff's Statement of Facts Not in Dispute (J.A. 13-15), and a record based on depositions of only the initial plaintiffs and defendants FRCP 30(b)(6) designees. (*See* J.A. at 47-63).

The case moved forward with regard to Sergeants. In April 1993, the Court ordered the addition of consenters under 29 U.S.C. § 216(b). Two hundred seventy-five additional Sergeants were added by June 1993. After a series of in-chambers arrangements supervised by Judge Cahill, discovery of representative, similarly situated plaintiffs and 30(b)(6) designees moved forward under the standing bifurcation order.

A five day Stage I bench trial to determine liability took place between September 15 and 21, 1993. The Court was clear that consideration of the salary test as it applied to the remaining plaintiffs continued under consideration. (J.A. at 67, 83 and 93).

At the beginning of the trial, Respondents' Counsel inquired as to whether the salary basis test was still in the case or whether it was resolved on the earlier motion for summary judgment. Judge Cahill reserved ruling—"Alright, we'll take it as the trial proceeds. Okay, I think that's enough." Trial Trans. I, 40-43. (J.A. at 67). At mid-trial, the issue was revisited. Trial Trans. III, 196-198, (J.A. 82-84). And, at the end of the trial Judge

[6] The court did, however, expressly find that Lieutenant Delgado was subject to the Department Manual disciplinary provision in Rule 7.0004(c)(1) which provided that he *could* be disciplined for less than a full pay period for any AWOL, even though he could not be docked pay or recorded as absent without leave for absenting himself for a part of a day. (Pet. App. at 71a).

Cahill commented on the issue again, noting he had not yet made up his mind on the salary basis test. Trial Trans. V, 158-159. (J.A. at 93-94).

The district court's final ruling on April 22, 1994, and entry of judgment on August 26, 1994, found all but two Sergeant positions to be exempt, without additional comment on the salary basis test. (Pet. App. at 67a-74a).

The case was duly appealed to the Eighth Circuit which ruled on September 8, 1995, 65 F.3d 702 (8th Cir. 1995), that all the plaintiffs' positions were exempt. (Pet. App. 1a-35a).

The Eighth Circuit applied its interpretation of the DOL's salary basis test disciplinary docking rule in the public sector under 29 C.F.R. §§ 541.5d and 118(a); discussed somewhat ambiguously whether the "subject to" deduction language in the regulation applies only where the employee's pay has actually been docked for less than a pay period for non-safety related disciplinary reasons; and opened Police Board access to the "window of correction" in 29 C.F.R. § 518.118(a)(6).

The Record Facts. All St. Louis Police Sergeants and Lieutenants are "subject to" deductions for violations of more than 40 non-safety disciplinary rules. The Manual states:

> A member of the Department [including all Sergeants and Lieutenants] shall be *subject to* disciplinary action for the violations of the rules of conduct set forth herein. (Pet. App. at 107a). (emphasis added).[7]

The Manual's disciplinary code then lists 39 violations beginning with "(a) conviction of a felony," and ending

[7] There is no need for a semantic debate concerning whether the words "subject to" applies solely to mandatory rules which use "shall" or to discretionary rules which use "may." The St. Louis disciplinary code uses neither but instead uses the actual regulatory term "subject to." *See*, n.3, *above*.

with "(mm) failure or refusal of firearm qualification," some with multiple sub-parts. (Pet. App. at 108a-113a). The Manual includes a table of penalties, which includes suspensions for less than a full work period at least eighty times. (Pet. App. 143a-149a).

An application of these rules was developed at trial. It involved Sergeant Guzy's two day suspension arising out of his 1990 violation of the Police Board's residency requirement. Guzy has not been reimbursed. The Police Board refuses such correction absent a final judicial decision that it must do so. Major portions of the disciplinary code remain. There has been no promise to revoke or reform it. Trial Trans. Vol. V, 65, 68-69, 87, 91. (J.A. at 87-88). After the Guzy docking, and wholly unrelated to this litigation, the portion of the disciplinary code which specifically applies to a residency requirement was revised in 1991 to make the sole penalty termination.[8] (Pet. App. 217a-219a).

The Police Board relies on the testimony of a single witness, the defendants' 30(b)(6) designee on record keeping, to establish that "no docking has occurred." However, here is that testimony:

[8] Note that the 1991 revision of the punishment for violating the residency requirement did not result from a promise to revise disciplinary docking as a general practice. Over eighty of the remaining proscribed penalties include docking of pay for less than a full pay period. Rather, the Police Board decided after the resolution of the Guzy case that a system requiring residency, which did not punish its violation by separation, could result in the continuing employment of officers who did not live within St. Louis.

In fact, the record in the Guzy case is not clear whether Guzy continued to maintain an apartment in St. Louis and an inherited home in St. Louis County. It is not clear that the two day suspension which was "negotiated" in Guzy's case was for violating the residency requirement or for another "lessor included" violation such as "failure to obey," Manual Provision 7.004(c), "reporting address change," Manual Provision 7.0004(k), or "discredit", Manual Provision 7.0004(jj), each of which continues to list suspension for less than a full work period as a punishment.

Q: Now, you testified that nobody—no Sergeant to your knowledge has ever been docked—

A: —That's correct—

Q: —*for less than a day*, but can they be docked for less than a day?

A: *For discipline*?

Q: For not working. Can anybody be docked for not working less than a day?

A: I can't answer that. That's—

Q: I just want to know from you, can that happen, you get an order from somebody that says dock this Sergeant three hours and don't pay him for three hours?

A: *It can happen only through disciplinary proceedings from the board of police commissioners.* I cannot have a captain call me and say dock this man three hours without documentation. We would not do that. (Cortelyou Depos., Respondents' Brief in Opp. to *Cert.*, at App. 7-8). (emphasis added)

While this is probative concerning "the part day docking" rule, which does not apply to the public sector at least after September 1991,[9] it does not establish that no one was ever disciplined for less than a full pay period for discipline. In fact, it is evidence that Sergeants are in fact subject to disciplinary docking. *No evidence supports a claim that "no one has been docked for violating*

[9] If anything, the Police Board lack of part day docking establishes that the "principles of public accountability" which generated limits on the part day docking rule applicable to public agencies are not available to the Police Board. Obviously, no "pay system established by state, ordinance, or regulations, or policy or practice established pursuant to principles of public accountability" requires special docking rules in the St. Louis Police Department. The Police Board has proven that a "part day docking" rule is neither mandatory nor, even in use in the St. Louis Police Department. In addition, the applicable pay statute sets maximums on the compensation of various law enforcement officers but also allows reduction below those maximums. (J.A. at 17 and 70).

a disciplinary rule." Nor did the employer present a single witness to testify that "no Sergeant has ever been docked," despite repeated testimony that they had the ability to check their records to determine if such a docking occurred. See *Cortelyou* Depos. (J.A. at 57).[10]

In fact, the Police Board's FRCP 30(b)(6) designee on compensation, Rosalie Cortelyou, also testified as follows:

> Q: . . . I'm interested in a situation where a Sergeant says to his Lieutenants, I want to take three hours off, and Lieutenant says, no, you can't take three hours off, I need you here. He goes home anyway.
>
> A: That would be disciplinary then.
>
> Q: But would he be docked for those three hours that he was absent without leave or absent without being excused?
>
> A: *Not at that point, no. He would have to—there would be an allegation of misconduct. He'd have to do through Internal Affairs, waivers would be signed or a board trial. Again that's disciplinary.* We would not dock him within the immediate time

[10] Q A few minutes ago you told me that you could search your records and determine if Sergeant Jones was docked two days pay, how such time Sergeant Jones had actually missed from duty to be docked that two days pay?

A That's correct.

Q And I'm not trying to confuse you. You still stick with that answer?

A Yes.

Q You would have something?

A Yes.

Q In light of not getting an AWOL report on the sergeant?

A *It would be a suspension, probably a disciplinary action from the board.*

Q Yes, but would you have a record as to how much time the sergeant had actually missed to cause that?

A Yes. If the duty roster were marked correctly, yes. (J.A. at 57). (emphasis added).

> frame, you know, within the next paycheck or anything like that. We would not take time away from him, no—dollars.
>
> Q: You would still pay him and *then he'd be disciplined later*?
>
> A: *Correct.* Cortelyou Depos. at 15; *see, also* at 33-35, 38-39 (J.A. at 49-57).[11] (emphasis added).

The Department's 30(b)(6) designee on the Department's policies generally, Chief of Police Sheetz, specifically testified that Sergeants are subject to charges and discipline under the Manual and that discipline could be imposed for matters not related to safety violations. The Chief of Police never denied that Sergeants could be suspended. Instead, he admitted he would suspend a Sergeant for unexcused absences. "I would say that he'd probably be—he could be—he could be suspended in lieu of, say, maybe one day suspension, two day suspension. . ." (J.A. at 60). When asked whether any Sergeant had been so disciplined, Chief Sheetz responded, *"I can't recall any specific case, but would say yes."* (J.A. at 62). (emphasis added).

The Police Department's designee on FLSA exemptions, Mr. Pattison testified:

> Q: . . . may the Sergeant be disciplined?
>
> A: Yes.
>
> Q: May the discipline include docking of pay?
>
> A: *The discipline could include suspension for a particular number of days, which would be loss of pay for that day.*

[11] Note that the post-1991 DOL rules which allow part day docking also allow "placing an employee on leave without pay status." 29 C.F.R. § 541.5d. Ms. Cortelyou testified that St. Louis does not place sergeants "in absent without leave status" for missing part of a day even though they would not otherwise lose available exempt status were the Police Board bound to require such docking by "principles of public accountability." Rather the Sergeants are "subject to" the more serious disciplinary suspension for less than a full pay period administered separately.

Q: So that during that pay period their pay would be reduced for that pay period by that day that they were suspended?

A: Yes. Pattison Depos. at 13-14) (J.A. 63-64) (emphasis added).

The Police Department never offered evidence, let alone proved that "no Sergeant or Lieutenant has been docked for disciplinary reasons." While the burden on the issue is on the Police Department, they did their utmost to keep the record clear of any evidence on the point. In 1993, Kurt Delabar was designated under 30(b)(6) concerning the exemption of Sergeants from FLSA. When Mr. Delabar was asked by the Sergeants' counsel "whether Sergeants are subject to payroll deductions in whole day increments as part of discipline," the Police Board counsel objected and *instructed the witness not to answer* the question.[12] *See*, Delabar Depos. at 19-20.

At trial, the *employer*'s witness, Lieutenant Scego, testified that Sergeants were subject to disciplinary docking.

Q: If, are Sergeants who work under you subject to discipline?

A: Yes.

Q: And I'm not, I realize none of these probably ever did this so hypothetically, if a Seregant were, for instance, insubordinate, they would be disciplined under general orders or a manual correct?

A: Under that scenario, yes, they could be.

Q: *And could the discipline that they receive include a suspension for a day or two? It would have to be approved through the procedures I understand.*

A: *Sure, but it could be longer than a day or two or it could be less.* Trial Trans. II, 141-142. (J.A. at 76). (emphasis added)

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[12] Judge Cahill resolved the resulting discovery dispute when he declared it moot two months after the trial on February 17, 1994.

Sergeant Dana Sanders, an Internal Affairs investigator charged with administration of the Department's disciplinary code, testified that she, as a Sergeant, was subject to disciplinary docking and that she could be suspended for a day or more. While Sergeant Sanders has been disciplined under the applicable procedures, she herself has not been disciplined while a Sergeant. Trial Trans. IV, 57 and 59. (J.A. at 85).

Precinct Sergeant Michael Frederick testified that he was subject to suspensions for a day or more under the disciplinary code; while he had never been disciplined, he testified that he knew of Sergeants who had been disciplined and suspended. Again, rather than even attempt to meet its burden on this issue, the employer attempted unsuccessfully to keep this testimony out of the record as hearsay. Trial Trans. IV, 95-96. (J.A. at 85).

Finally, Guzy, of course, testified concerning his two day suspension. He also testified that he remains subject to disciplinary suspension for any of the numerous remaining violations listed in the disciplinary code. (J.A. 87-88; Pet. App. 217a-219a).

This is the complete record concerning docking.

Judge Cahill clarified on the record that the statutory "salaries" are "maximums." Trial Trans. I, 92. J.A. at 70). These "salaries" do not prevent or otherwise impact disciplinary deductions; such deductions can bring a Sergeant's compensation below the "salary" set forth in the Missouri statute. (J.A. at 17).

Sergeants' and Lieutenants' records are kept on an hour-for-hour basis. Recreation time, vacation time, sick leave and shift assignments are recorded, credited and debited on an hourly basis. They have no discretion or control over their hours of work. *See*, Facts *Not In Dispute, Para.* 8 and 9; Cortelyou Depos. at 13, 17-18; Burgdorf Depos. at 49; Auer Depos. at 7; Day

Depos. at 5-6; Scheetz Depos. at 31-33; Pattison Depos. at 13; Plaintiffs' Answer 3 to Defendants' Second Interrogatories # 13; August 2, 1988 Memorandum from Major Walsh; and August 23, 1988 memorandum from Lt. Col. Hall. (J.A. at 3, 4, 6, 11-12, 47, 58, 60-61 and 63).

Sergeants are paid shift differentials for each hour worked on the midnight shift. (J.A. at 16); Trial Trans. II, 182. (J.A. at 77). At times they are paid compensatory time for overtime hours. They use accrued compensatory time in hourly increments. Their compensation is also converted into hourly increments. Trial Trans. II, 205-207, 230, 237-238. (J.A. at 77-78). Some Sergeants and Lieutenants receive overtime pay when working in federal crime programs. The employer's designee testified that Sgt. Conreux regularly received overtime in his day-to-day assignment. Cortelyou Depos. at 14 (J.A. at 48). While under federal authority they are treated as non-exempt for FLSA purposes. (Trial Trans. III, 32-33 (J.A. at 81). Overtime pay was paid to Sergeants during the 1993 flood of the Mississippi and Missouri Rivers and on other occasions where the funding was available from sources other than the Department. (Trial Trans. I at 130-131, 138, 143; Trial Trans. II at 141; Trial Trans. III at p. 166; Trial Trans. V, 66 (J.A. at 64, 76, 87).

SUMMARY OF ARGUMENT

The decision of the Eighth Circuit that St. Louis Police Sergeants and Lieutenants are exempt from coverage under the Fair Labor Standards Act maximum hours standard should be reversed. The Eighth Circuit misapplied the salary basis disciplinary docking rule in 29 C.F.R. §§ 541.5d and 541.118(a)(5) and the "window of correction" in 29 C.F.R. § 541.118(a)(6). Those rules are reasonable. They were developed pursuant to a Congressional directive that the Secretary of Labor "define and delimit" the breadth of FLSA "white collar" exemption.

29 U.S.C. § 213(a)(1).[13] The Department of Labor's rules are entitled to special deference.[14] This Court has held that all FLSA exemptions must be narrowly construed.

The misapplication of the Department of Labor's rules combines with the ambiguity of the decision itself to convert a clear objective, enforceable rule into one which is unclear and unenforceable.

This Court should endorse a rule that any employee who *as a practical matter* is subject to disciplinary docking for less than a full pay period is covered by the hours of work standard. Actual instances of docking are relevant, but not necessary, to application of this *as a practical matter* rule.

This Court should endorse a window of correction rule which requires all four of its traditional elements. The window is open only in cases in which an employer (1) meets, by clear and affirmative evidence, a burden to prove, (2) that any deductions were inadvertent, in the sense of mistaken or unintended, (3) that all deductions were fully rectified upon discovery, and (4) that all rules

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[13] The Secretary is, of course, the official with overall responsibility for FLSA enforcement. Under the FLSA, the Secretary is given explicit authority to "supervise the payment of unpaid . . . overtime compensation owing to any employee," and to bring civil suits to enforce § 7's overtime compensation provisions. 29 U.S.C. § 216(c). *See also* 29 U.S.C. § 217. Although employees may bring independent actions without relying on the Secretary—as petitioners have brought an independent action here—the right to bring such an action terminates if the Secretary chooses to file suit. 29 U.S.C. § 216(b). The Secretary also has the statutory responsibility under § 6 of the 1985 Public Sector FLSA Amendments to "promulgate such regulations as may be required" to implement Congress' explicit accommodation to the special needs of state and local agencies. P.L. 99-150, § 6; 99 Stat. 790.

[14] *See, NLRB v. Aerospace Co. Div. of Texton,* 416 U.S. 267, 274-275 (1974); *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837, 843-844 (1984).

or codes subjecting the employee to discipline have been completely and forever revoked.

ARGUMENT

I. THE FLSA'S GOAL OF A BROAD NATIONAL HOURS OF WORK STANDARD PRESUMES COVERAGE OF ALL EMPLOYEES AND IS SUSCEPTIBLE ONLY TO VERY LIMITED, NARROWLY CONSTRUED, STRICTLY REGULATED EXEMPTIONS.

The development of a broad, widely applicable national hours of work standard is a fundamental element of the history of American social legislation and law: the 1791 Philadelphia Carpenters strike for the ten hour day; the Jacksonian era ten hour day movement; President Van Buren's 1840 ten hour federal work day executive order; the 1850's nine hour movement; the abolitionists' hours of work reforms and the 1842 drive of female mill workers for a sensible day; Horace Greeley's post-Civil War Radical Republican program; the Catholic Labor Movement hours of work crusade; the nine hour day movement of the Progressives at the turn of the century involving the National Consumers League, Florence Kelly, Grace Abbott, and the early pre-Supreme Court work of Louis Brandeis and Felix Frankfurter; T.R. Roosevelt's Bull Moose Platform; Woodrow Wilson's W.W.I. hours standard; the 1927 N.Y. Police eight hour day order; Herbert Hoover's Platform; and 1932 Chamber of Commerce President Harriman's CBS radio plea.[15] Hours of work

[15] *See*, Roediger and Foner, *Our Own Time: A History of American Labor and the Working Day* (Greenwood Press, 1989); Hunnicutt, *Work Without End: Abandoning Shorter Hours for the Right to Work* (Temple University Press, 1988); Rosensweig, *Eight Hours for What We Will: Workers and Leisure in an Industrial City 1870-1920* (Cambridge University Press, 1983), Steinberg, *Wages and Hours: Labor Reform in the Twentieth Century* (Rutgers University Press, 1982); Cahill, *Shorter Hours: A Study Since the Civil War* (Columbia University Press, 1932); Nordland, "A Brief History of the FLSA," 39 *Labor Law Journal* 715-28 (November 1988); Hunnicutt, "Monsignor Ryan and the

questions go to the core of the work place and have reached the Court from the turn of the last century.[16] The hours of work movement prior to the Great Depression was international. As described by Louis Brandeis in the original "Brandeis Brief," filed in 1908 in *Muller v. Oregon*, 208 U.S. 412 (1908), there is a worldwide need for an hours of work standard. Brandeis made a strong public policy argument that so long as men, women [and originally children] work, pressure will be felt between the demands of the work place and the demands for a sane society, a strong community and a healthy family. See, the Brandeis Brief, its analysis in *Amicus Curiae Brief of the National Employment Law Project*, and Mason, *Brandeis: A Free Man's Life* (Viking Press, 1946), at 248-253.

The 1937 enactment of the Fair Labor Standards Act and its forty hour standard was the culmination of this movement. The Act was a compromise after the defeat of the 1935 Black-Connery "Thirty Hour Week" bill intended by its sponsors Senator Hugo Black and Congressman William Connery to cover all American employees. Its exemptions were intended to be very narrow. The narrow class of highly paid executives, top level administrators, and professionals, who in 1937, were thought to include those very few who were not truly "employees" at

Shorter Hours of Labor," 69 *Catholic Historical Review* 384-401 (July 1983); Eggert, "Fight for the Eight Hour Day," *American History Illustrated*, 36-44 (May 1972); and Appendix A Chronology to the *Amicus Curiae Brief of The National Employment Law Project.*

[16] *See*, for example, *United States v. Martin*, 94 U.S. 100 (1876); *Holden v. Hardy*, 169 U.S. 366 (1898); *Lochner v. New York*, 198 U.S. 45 (1905); *Muller v. Oregon*, 208 U.S. 412 (1908); *Hawley v. Walker*, 232 U.S. 718 (1914); *Hunting v. Oregon*, 243 U.S. 426 (1917); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Moorehead v. New York ex. rel Tipaldo*, 298 U.S. 238 (1936); and *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); and Dalrymple, *Sexual Distinctions in the Law: Early Maximum Hour Decisions of the United States Supreme Court* (Garland, 1987).

all. Senator Black liked things to be as clear as possible. He wanted a bright line for employers under the Act. See, historical research in n.15, *above*. The exemption provisions designated the Secretary of Labor to "define and *delimit*" exemptions. 29 U.S.C. § 203(a)(1).

The Fair Labor Standards Act was designed by its sponsors "to expand the frontiers of social progress" by "insuring to all our able-bodied working men and women a fair day's pay for a fair day's work." Message of the President to Congress, May 24, 1937.

Almost immediately employers argued that the exemptions should be read broadly. They argued that all "white collar" workers were intended to be excluded. In 1940, the seminal report by the Wage and Hour Administrator on the Act, the "Stein Report," specifically rejected the argument put forward by the Chamber of Commerce and others that the forty hour work week should cover only workers earning approximately the minimum wage, and, concomitantly, that highly compensated employees should be exempt from the Act's hours of work standard regardless of the degree to which they lack the prestige and status associated in 1940 with the terms "executive and professional."

> Another argument frequently advanced by the proponents of a blanket exemption for white collar workers is that the maximum hours provisions of the Act are or should be applicable only to persons whose earnings approximate the minimum wage. "A ceiling for hours" is just as much an independent objective of the Act as a "floor for wages," and surely it is a serious misreading of the Act to assume that Congress meant to discourage long hours of work only where the wages paid were close to the statutory minimum. Living conditions can be improved and work spread even where wages are comparatively high. "Stein Report" (October 10, 1940), *Wage and Hour Manaual* (BNA), Cumulative Edition 1944-1945, at 679-680. (J.A. at 30-31).

A. This Court Conservatively, Consistently and Narrowly Construes Efforts To Expand Exemptions.

In every decade since the FLSA's enactment, employers have challenged the narrowly restrictive nature of its exemptions with similar arguments. In every decade they have been rebuffed.

In 1944, the question of the breadth and purpose of FLSA exemption reached this Court. In *Phillips v. Walling*, 324 U.S. 490 (1945), the Court ruled that—

> Any exemption from such humanitarian and remedial legislation must be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakenly within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people. 324 U.S. at 493.

In that same year, the Tenth Circuit Court of Appeals, upheld the reasonableness of the salary basis requirement of the "white collar" exemption section of the Act. See, *Walling v. Yeakey*, 140 F.2d 830, 832-833 (10th Cir. 1944) ("[I]n most cases, salary is a pertinent criterion and we cannot say that it is irrational or unreasonable to include it in the definition and delimitation [of *bona fide* executive, administrative and professional employees.]")

The Secretary of Labor reaffirmed these principles in a 1949 report rejecting any broadening of exemption and removal of the "salary basis" test:

> Compensation on a salary basis appears to have been almost universally recognized as the only method of payment consistent with the status implied by the term "bona fide" executive. Similarly, payment on a salary (or fee) basis is one of the recognized attributes of administrative and professional employment. The proposals to eliminate the requirement and to

apply an hourly rate or average earnings test may therefore be rejected as inconsistent with true executive, administrative or professional status. "Weiss Report" at 39 (June 1949). (J.A. at 36-37).[17]

In 1950, the Court pointed out that the "breadth of coverage" of the FLSA's overtime hours rules is "vital to [its] mission: of establishing a national work week standard and that statutory exemptions of the Act should be narrowly construed. *Powell v. United States Cartridge Co.*, 399 U.S. 497, 516 (1950). In 1959, the Court stated "[FLSA] exemptions are to be narrowly construed in order to further Congress' goal of providing broad federal employment protection." *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 207, 211 (1959).

In 1960, *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960), this Court emphasized that "exemptions are to be narrowly construed against employers seeking to assert them and their applicaton limited to those establishments plainly and unmistakenly with their terms and spirit."

By the 1970's it was clear that the presumption was that an employee is not exempt. The employer has the burden to prove by "clear and affirmative evidence" that each employee for whom an exemption is claimed is entitled to a *bona fide* exemption under the Department of

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[17] Note the Joint Appendix mistakenly dates this report as 1940, it should read 1949. The Department of Labor's "Stein Report", on October 10, 1940, also stated—

> All of the foregoing arguments have as an inarticulate major premise the assumption that all salaried white collar workers enjoy satisfactory working conditions—that they need no protection against oppressively long hours. The record shows the incorrectness of this assumption. There is evidence, some of it introduced by the proponents of the blanket exemption, that, prior to the effective date of the act, a workweek of 48 or 54 hours or even longer was common. (J.A. at 32)

Labor's regulations. Employers have the burden of proving their entitlement to any exemption. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974) ("application of an exemption under the FLSA is a matter of affirmative defense on which the employer has the burden of proof.")

In 1985, the Court insisted again that the FLSA must be "consistently construe[d] liberally to apply to the furthest reaches consistent with Congressional direction . . . recognizing that broad coverage is essential to accomplish the [FLSA's] goal[s] . . ." *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 296 (1985).

B. The Congress Has Historically Expanded FLSA Coverage, Is Open To Reform, But Has Been Reluctant To Broaden Exemptions.

While the Court has played a key role in the development of FLSA, Congress and the Department of Labor have been equally clear with regard to the narrow nature of exemptions. Congress and the Department have been sensitive to the need to adjust the Act to the times. They have been responsive to problems. However, they have also been reluctant to broaden exemptions from the Act recognizing that the breadth of coverage is indeed "essential to accomplish the goals of the Act."

Beginning in the 1960's, Congress has repeatedly revised the FLSA to reflect the changes which public employer and employee groups brought to the attention of Congress. In 1966, Congress amended the FLSA to apply, for the first time, to a limited number of the public sector employees. 80 Stat. 83 (1966).

In 1974, Congress passed amendments to the Act which extended its coverage to state and municipal employers as of January 1, 1975.[18] However, due to the

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[18] Congress expressly indicated an intent that the Act would be administered after 1974 "in such a manner as to insure consistency

unusual working conditions and long hours of duty of fire fighters and law enforcement employees and in order to alleviate the financial burdens that might be otherwise imposed on public employers, Congress added section 7(k) (29 U.S.C. § 207(k)) as a special overtime provision for employees in those categories. Instead of requiring overtime compensation after forty (40) hours of work in seven (7) days, Congress set a higher threshold that would, over several years, be reduced to 216 hours in a 28-day work period (or proportionally, 50 hours in seven (7) days). Alternately, if studies conducted by the United States Department of Labor showed that the hourly overtime threshold for these employees should be lower than 216 hours, then such lower hourly threshold would apply. 88 Stat. 58 (1974).

After some delay, in 1981, the Department of Labor completed its study and established the current 171 hour 28-day standard in law enforcement. 48 Fed. Reg. 40518 (1981); 29 C.F.R. §§ 553.200-230.

When Congress extended the Fair Labor Standards Act to state and local government employees in 1974, it was the intent of Congress that the same minimum wage and hour standards be applied to government that are applied to private sector employers. The 1973 Senate report leading up to the 1974 amendments states:

> The Committee recognizes and the bill reflects an awareness that to raise the minimum wage without expanding the coverage of the Act would serve to deny even the minimum benefits of the Act to large groups of workers who have been denied the protection of the Act for more than 30 years . . . Equity demands that a worker should not be asked to work

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with the meaning, scope, and applications established by rulings, regulations, interpretations, and opinions of the Secretary of Labor which are applicable in other sectors of the economy." H.R. Rep. 913, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811.

> for subminimum wages in order to subsidize—his employer, whether that employer is engaged in private business or in government business. S. Rep. No. 300, 93rd Cong., 1st Sess. at 17.725. (1974).

This Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), however, rendered the 1974 application in the public sector largely dormant, until 1984 when this Court decided *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 328 (1985).

After the *Garcia* decision, in 1985 many public employer groups sought Congressional relief from FLSA coverage, arguing that it would be too costly and negatively effect their function. Indeed, the first formal legislative proposal would have exempted public employers from all overtime provisions of the FLSA. S. 1570, 99th Cong., 1st Sess. (1985); *Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources, Fair Labor Standards Amendments of 1985*, 99th Cong., 1st Sess. (1985) (Sen. Nickles). This was strongly opposed.

To avoid a legislative deadlock, Congress assisted on negotiations between public employers and public employees to create an extensive compromise. *See, e.g.*, 131 Cong. Rec. S.14047 (Sen. Nickles) (the final Senate bill "is different from the bill I originally introduced and represented a compromise among the affected parties); 131 Cong. Rec. H.9916 (Rep. Hawkins) ("bipartisan efforts" and "compromise" produced the 1984 Amendments.) The compromise bill was supported by "the U.S. Conference of Mayors, the National League of Cities, the National Conference of State Legislators, the AFL-CIO and the Fraternal Order of Police." 131 Cong. Rec. 2.14047; 131 Cong. Rec. H.9238. With such broad support, Congress quickly passed the 1985 FLSA Amendments. P.L. 99-150, 99 Stat. 790 (1985).

These 1985 Amendments added a number of provisions to the FLSA to directly accommodate the concerns which

public employers raised to Congress.[19] In particular, Congress permitted public agencies to provide compensatory time in lieu of cash for overtime pay (29 U.S.C. § 207 (o)), provided overtime exemptions for public agencies in certain situations where employees work two jobs (29 U.S.C. § 207(p)), provided public agencies with special rules for employee volunteers (29 U.S.C. § 203(c)(4)); exempt non-civil service employees of the legislative branch of state and local government. (29 U.S.C. § 203 (e)(2)(ii)(v)); and provided public employers with a one year retroactive "grace period" in which to come into full compliance with this Act. 99 Stat. 790 (1985). The legislation did not change the exemption provisions at issue here.

Since 1985, Congress has remained attentive to the concerns raised by employer groups, amending the FLSA as necessary. Specifically, in 1990, Congress directed the Secretary of Labor to revise the regulations so that certain employees in the computer field would not need to be paid on a "salary basis" provided their hourly rate of pay is at least 6 and ½ times the minimum wage. P.L. 101-583, 104 Stat. 2871 (Nov. 15, 1990). Similarly, in 1993, Congress provided that the fact that an employee takes unpaid leaves of absence under the Family and Medical Leave Act would not defeat the "salary basis" test for an otherwise exempt employee. P.L. 103-3, 107 Stat. 6 (February 5, 1993). The first enactment of the 104th Congress, the Congressional Accountability Act of 1995 (P.L. No. 104-1, 109 Stat. 3), applied the FLSA and its exemptions and the salary basis test to Congressional employees.[20] In 1995, Congress also enacted a special

[19] *See* H.R. Rep. No. 99-331, 99th Cong., 1st Sess. 17 (1985) (Congress recognized that it was "essential that the particular needs and circumstances of the states and their political subdivisions be carefully weighed and accomodated" by the political/legislative process designed for that purpose).

[20] *See*, CRS, *Report for Congress*, 95-557A (May 2, 1995) and Cong. Office of Compliance Regulations, 141 Cong. Rec. S. 17613 (November 28, 1995).

exemption from the strict overtime requirements for public sector court reporters permitting them to continue to receive a per page transcribing fee, in certain circumstances, and excluded that fee from the regular rate of pay for overtime purposes. P.L. 104-26, 109 Stat. 264 (September 6, 1995)

At the same time, Congress has specifically considered, and refused other requests. At least six times between 1991 and 1996, members of Congress have submitted bills on behalf of public employers to broaden the "white collar" exemptions or to remove the salary basis test within the public sector.[21] Congress has held no less than six hearings on the FLSA application since 1991, often taking testimony from public employers.[22] Congress has con-

[21] *1991:* S. 1670, 102d Cong., 1st Sess. (July 1991) (a bill to remove the salary basis test from the public sector after the Ninth Circuit's *Abshire* ruling); *1992:* S. 3089, 102d Cong., 2d Sess. (July 1992) (a bill to broaden the "white collar" exemptions by removing the salary basis requirement in the public sector); *1993:* H.R. 1309, 103d Cong., 1st Sess. (March 1993) (A bill to broaden the "white collar" exemptions to permit otherwise exempt employees to be subject to part day docking); S. 1354 103d Cong., 1st Sess. (August 1993) (A bill to broaden the "white collar" exemptions to permit part-day deductions, disciplinary deductions, strict accounting of hours of work and to subject the employee to specific hours of work for an otherwise exempt employee); *1995:* H.R. 946, 104th Cong., 1st Sess. (February 1995) (A bill to broaden the "white collar" exemptions to permit certain deductions in pay from an otherwise exempt public employee); H.R. 2723, 104th Cong., 1st Sess. (December 1995) (A bill to broaden the "white collar" exemptions to permit certain deductions from pay for otherwise exempt employees).

[22] *1991:* Cong. Rec. S-12,253 (1991) records hearings held on bill S. 1670 to remove the salary basis test from the public sector; *1992:* Cong. Rec. H-341-4 (1992) records hearings on the salary basis test in the public sector; *1993:* Hearings were also held in the Spring 1993 on bill H.R. 1309 broadening white collar exemptions before the House labor Standards Subcommittee; *1995:* Hearings before the House Sub-Committee on Workforce Protection (June 1995) Hearings on H.R. 2391 (November 1995) before the

sistently to date refused to broaden the exemption or revise the salary basis test. Congress's reluctance to amend the Act to overrule the Department of Labor's longstanding interpretation of the salary basis test and its disciplinary docking rules is "persuasive evidence that the interpretation is the one intended by Congress." *North Haven Bd. of Education v. Bell*, 456 U.S. 512, 535 (1982); *NLRB v. Aerospace Co. Div. of Textron*, 416 U.S. 267, 274-75 (1974).[23]

C. The Department of Labor Has Also Been Open While It Strictly Regulates Exemptions.

The Department of Labor has been equally active in revising the FLSA regulations to accommodate the needs of public employers as the evidence is presented that they need revision.

In 1954, the DOL issued a Notice of Proposed Rule Making on the salary basis test. The Notice included, for the first time, the language regarding the disciplinary deduction rule of 29 C.F.R. § 541.118(a)(5). The proposed disciplinary docking rule recommended that "penalties imposed for infractions of safety rules *or for other major disciplinary reasons* will not affect salaried status." 19 Fed. Reg. 1321 (1954) (emphasis added). However, after receiving comments on the proposed salary basis test, the DOL declared "on the basis of the comments, the provision that penalties may be imposed for major disciplinary reasons has been deleted, and the provision governing safety rules has been clarified." 19 Fed. Reg. 4405 (1954). Thus, DOL revised the disciplinary docking rule to the current language. 19 Fed. Reg. 1321 and 4405 (1954). The Secretary of Labor was active in the negotiations and hearings on Capitol hill surrounding the 1985 Amendments. In addition, the Secretary agreed not to enforce the *Garcia* decision until Congress had an opportunity to review and decide whether to revise the FLSA.

Immediately following the passage of the 1985 Amendments, the DOL held a series of meetings with representatives of public employers and public employee organizations to discuss the issuance of proposed regulations addressing the Amendments. 51 Fed. Reg. 13402 (April 18, 1986). After the Secretary received extensive comments from public employers and public employee organizations, the final rule was issued. 52 Fed. Reg. 2012 (January 16, 1987).

Shortly after the 1985 Amendments became effective, the DOL received a comment from a public employer who claimed that their state constitution prohibited them from paying any public employee for a whole day if he or she did not work the whole day. As a result of this comment, the DOL issued a "non-enforcement" policy. It declared that it would not enforce the part-day docking portion of the salary basis test against any public sector employee *who otherwise met the requirements for exempt status*, provided the applicable state or local law required the employer to deduct pay for absences of *less than a day* for public accountability reasons. *See*, DOL Opinion Letter Ruling of January 9, 1987.

As a result of the Ninth Circuit's *Abshire* decision, the DOL opened another comment period to determine whether changes needed to be made to the salary basis test in the public sector. The DOL received 199 comments from public employers and 25 from public em-

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House Sub-Committee on Workforce Protection of the Committee on Economic and Educational Opportunities.

[23] Additional activity is anticipated by both the Senate Labor Committee and House Sub-Committee on Labor Standards. Note that the "Public Sector, FLSA Coalition" composed of the National League of Cities, National Assn. of Counties, Council of State Governments, U.S. Conf. of Mayors, National Public Employee Relations Associations, and others prepared a "Briefing Paper" in April 1996 which provides: "Option: Either by statute or revised regulations eliminate the salary basis test and rely on a revised duty test." FLSA Coalition Briefing Paper (Wash., D.C., April 1996).

ployee organizations. As a result of those comments, the DOL issued its September 6, 1991 interim rule removing the part-day docking from the salary basis test in the public sector provided the employee *otherwise met the requirement of exempt status (including the other salary requirements)*, and provided the public agency was bound by principles of public accountability by law. 56 Fed. Reg. 45824 (Sept. 6, 1991) (Pet. App. at 86a). The DOL continued to receive comments and on August 19, 1992 issued its final ruling removing the part-day docking from the salary basis test in the public sector under the conditions explained above. 57 Fed. Reg. 37666 (August 19, 1992) (Pet. App. at 184a).

Although the Department determined there was sufficient justification to remove the part-day docking rule from the public sector, it expressly stated that the hundreds of commentators failed to present sufficient justification to remove entirely the salary basis test from the public sector. *Id.* at 37673 (Pet. App. at 208a-209a), or to revise the salary basis test to permit disciplinary suspensions of less than a pay period for public sector employees. (Pet. App. 209a-210a).[24]

Separately, in 1985 the Department invited comments on all of its exemption rules. After an extensive open comment period closed in 1987, over 200 comments were made with no suggestions on the salary *basis* test, disciplinary docking rule or window of correction. Since 1987, the Department has repeatedly invited additional

[24] "[T]he comments failed to demonstrate that public employers are significantly more restricted in the availability of options with respect to employee discipline than private employers. Although public employee terminations may require compliance wtih procedures designed to protect employee rights, termination for disciplinary reasons is not generally unavailable. In addition, other remedies for disciplinary infractions, such as official reprimands, demotions, and reassignment or restriction of duties, are generally available and used in the public sector." 57 Fed. Reg. 37674 (Pet. App. at 210a).

comments. Most recently, on May 13, 1996, the DOL published a Notice of Proposed Rulemaking with an appropriate comment period concerning the salary basis regulations. 50 Fed. Reg. 47696; 61 Fed. Reg. 23238 (May 13, 1996). (J.A. at 43-46).[25]

II. THE FLSA SALARY BASIS AND DISCIPLINARY DOCKING RULES ARE REASONABLE AND EFFECTIVE ENFORCEMENT COMPONENTS OF THE NATIONAL HOURS OF WORK STANDARD.

A. The Salary Basis Test Is A Reasonable Exemption Standard and an Effective Enforcement Tool.

This case involves the application of the "salary basis/anti-disciplinary docking" requirement for exempt executives and managerial administrators.[26] The regulations under review provide that such exempt employees must be paid on a "salary basis." Early on, the DOL found, after extended hearings, that true, high paid executives

[25] "Alternatives likely to be considered include particular changes to address "salary basis" and salary level issues to a comprehensive overhaul of the regulations that also addresses the duties and responsibilities tests." (J.A. at 45).

[26] These issues have been widely litigated. See, "Table A: FLSA Salary Test Conflicts In Circuits" to the *Cert. Pet.* in this case which lists and compares twenty-four salary basis tests from all of the Circuit Courts of Appeal except the First and Third. The meaning of "subject to" had been faced in all of those circuits. The "window of correction" had not been faced in the District of Columbia, the Fifth Circuit, and the Tenth Circuit, as well as, the First and Third."

Since the petition was filed, the Second, Third, Ninth and Tenth have issued additional decisions. *See, Yourman v. Dinkins*, slip op. 95-7561 (2d Cir. 1996), *cert. pending*; *Balgowan v. New Jersey Dept. of Transportation*, slip op. 95-5276 (3d Cir. 1996), *vacated on other grounds, pending reh'g*; *McGuire v. City of Portland*, slip op. 95-35591 (9th Cir. 1996); *Hackett v. Lane County*, slip op. 95-35283 (9th Cir. 1996); *Hernandez v. Santa Anna*, slip op. 93-56634 (9th Cir. 1996); and *Carpenter v. Denver*, 82 F.3d 353 (10th Cir. 1996), *cert. pending*. These new decisions all support the majority of circuits. See n.32.

and exempt administrators are paid on a salary basis rather than as hourly employees. *See,* 19 Fed. Reg. 4405 (1954); Kantor Report (1958) (salaried status "is an index of the status that sets off the *bona fide* executive from the working squad-leader.") (J.A. at 42).

The salary basis test is the most objective barometer of exempt status. It is applied without the time study or desk audit required to apply the duties tests. The duties test under the applicable regulations are difficult to apply, require individualized employee-by-employee studies of what work is being done and for what period of time, and the subjective.[27] When reviewed by a DOL field examiner, an employer's personnel office, or a federal judge called upon to apply them, the duties test generates the feeling which Judge Cahill faced in this case after the fifth full day of trial—

> So, in summary, what I'm telling you now is, obviously I have not made up my mind about this case. I've played the ping-pong role here. The balls have bounced back and forth and so has my mind, so I have not decided on the case in any way. Trial Trans. V, 168 (J.A. at 94).

The salary test is exactly the objective barometer that best settles the close question of who is exempt and who is not.

> Essentially, the salary tests are guides to assist in distinguishing *bona fide* executive, administrative and professonal employees from those who were not intended by the Congress to come within these categories. They furnish a practical guide to the investi-

[27] For example, the duties test for an exempt administrator requires a fact specific analysis of whether a particular employee's primary duty consists of office or non-manual work "directly related to management policies or general business operations," and whether the employee customarily and regularly exercises discretion and independent judgment; whether the employee performs these duties only under general supervision; and a study of the amount of time the employee is engaged in exempt as compared to non-exempt activities. 29 C.F.R. § 541.2 (Pet. App. at 78a).

> gator as well as to employers and employees in borderline cases, and simplify enforcement by providing a ready method of screening out the obviously nonexempt employees. [Kantor Report (1958); J.A. at 42.]

B. The Disciplinary Docking Rule Is A Reasonable Exemption Standard and a True Measure of Salaried Status.

After the 1991/1992 regulatory amendment, which removed the "part day docking rule" from the public sector salary basis test while retaining the remainder of the salary test, 29 C.F.R. § 541.5d, some questioned whether there is a rational basis for the disciplinary docking provision of the salary basis test. Others, including Judge Posner in *Wisconsin v. Mueller,* 54 F.3d 438 (7th Cir. 1995), *cert. pending* (Case No. 96-586), accepted its rationality but failed to fully appreciate its need and purpose.[28] The question is not as challenging as some have made it: (1) no special justifications such as public accountability apply, and (2) Congress never intended the exemptions to apply to those subject to discipline.

First, DOL's reason for revising the basic thirty-seven year old salary basis test by removing the part day docking rule from its public sector provisions was *not* that under normal conditions that test was not a tried and true indicator of non-exempt status. Rather, the justification for the revisions was that "requirements of public

[28] In reviewing the general rationality of the disciplinary docking rule, the Ninth Circuit Court of Appeals explained that although at first blush the rule may not seem logical, a closer examination of the history behind the regulation reveals the salary basis test is a sound and rational method of "defining and delimiting" the exemptions. *Craig v. Far West Engineering Company, Inc.,* 265 F.2d 251, 259 (9th Cir.) *cert. denied,* 361 U.S. 816 (1959). Significantly, the Ninth Circuit relied on the fact that the DOL's 1940 report and recommendations "indicated that the employers participating in the hearings were unanimous in approving the salary test because . . . [it] is a valuable and easily applied index." *Id.*

accountability" often subject executives and managerial administrators to part day deduction who would never be so subjected. 57 Fed. Reg. 37666 (1992). This was claimed, but certainly not universally demonstrated, to be caused by state constitutional and statutory rules. The argument was that state restraints require that all public employees be docked pay when they do not come to work, even for a short period. *Id.*; (Pet. App. at 190a-192a). The Department of Labor found in 1991, after considerable appeal by Governors and county and municipal officers, that these "principles of public accountability" created a situation in which particular and peculiar public accountability requirements, unrelated to the salary basis test, prevented full compliance with the part day docking rule. *Id.*

No such special principles of public accountability apply to the disciplinary docking rule. Any public employer may adopt disciplinary code subjecting its top executives and managerial administrative employees to forms of discipline other than disciplinary suspension for less than a full work period. *See,* 57 Fed. Reg. 37666 (1992); (Pet. App. at 210a) (DOL noting employers may adopt "other remedies for disciplinary infractions, such as official reprimands, demotions, and reassignment or restriction of duties . . ."). (Pet. App. at 210a). *See, also, above* n.3.

Second, as has been the case since at least World War II, the basic concept of highly paid American executive and managerial administrators is that such employees would not be subject to losses of pay over a brief term for disciplinary infractions. Reports promulgated after World War II and in 1954 are just as binding today as they were then,[29] some things change with decades; some

[29] *Compare,* Weiss Report (1949) (J.A. at 39) (Noting disciplinary deductions of executive, administrative and professional employees were a war time phenomenon. "Such deductions are rarely made today. The disciplining of such employees in the rare instances where it is needed is usually accomplished in other ways than by deductions from salary.") with 57 Fed. Reg. 37666 (1992) (Noting public employers can discipline executive, administrative and professional employees in ways other than through short disciplinary deductions.) *See, above,* at 27, on 19 Fed. Reg. 1321 and 4405 (1954).

remain constant. High executives, top managerial administrators and true professionals are independent, enjoy broad discretion, control their own work place *and* earn compensation which is not conditioned on avoiding discipline. They need no hours of work standard. Disciplinary conditions on pay are a truer marker of the non-exempt employee who does need hours of work protection. The employee who is "subject to" discipline does not loose exempt status on the basis of a *technicality*. Rather, the employee which an employer thinks of as potentially needing discipline could never be a true executive, exempt administrator or professional, even if her or she seems to fulfill the *technicalities* of the duties test. The "salary basis" test is the truer measure because it is a superior measure of intent. Respondents below, put forward no argument with regard to disciplinary deductions which varies from the arguments put forward by private management associations in the 1940's and 1950's.

The exempt are the disciplinarians; those subject to discipline are the non-exempt.

Further, the disciplinary docking rule as it specifically applies in the law enforcement context, not only raises no accountability issue, but it is operationally reasonable. Public employers need not claim that they *must* suspend sergeants and lieutenants for periods of less than a week for rule infractions. Other forms of discipline are superior. Suspensions in pay remove much needed officers from the streets of our communities and other important law enforcement duties. Moreover, for an overworked sergeant or lieutenant, a day or two "vacation" may not be viewed as disciplinary at all. The loss of accrued vacation leave, denial of preferred assignments, written repri-

mands, and reductions in evaluations are far more effective.[30]

III. THE EIGHTH CIRCUIT'S AMBIGUITY CONVERTS A CLEAR, OBJECTIVE, ENFORCEABLE RULE TO ONE WHICH IS UNCLEAR AND UNENFORCEABLE.

What did the Eighth Circuit Mean? The Court of Appeals found—

> *Arguably,* the department's two-day deduction from Sergeant Guzy would require him to be treated as a non-exempt employee.
>
> A one-time deduction, however, does not *automatically* require the determination that all Sergeants are non-salaried. The regulations provide for a "window of correction." (Pet. App. at 9a) (emphasis supplied).

What does this mean? Did the court find that non-exempt status was, in fact, lost but that the problem was then corrected by the "window of correction"; or did it find that exempt status was only *arguably,* but not actually, lost? Was exemption "lost" for *all* and then "regained" for all Sergeants and Lieutenants, even those who loyally avoided discipline, or only for Guzy? Or, did only Guzy lose the exemption? Did the Court mean that while Sergeants are not *automatically* non-salaried, based on the disciplinary code and its application to Guzy, they would have been "nonsalaried" *but for* a proper use of the

[30] *See,* U.S. Department of Labor, Wage and Hour Division, Letter Ruling, January 13, 1994 (Explaining that truly exempt employees may be disciplined in other ways than suspensions without pay. "It would appear that reducing accrued leave entitlement by a day or days for the infraction could achieve the desired disciplinary goal. In our view, such a practice would not affect the salary basis."); *McGuire v. Portland,* slip op. 95-35391 (9th Cir. 1996); and *Wisconsin v. Mueller,* 54 F.3d at 442, 443 (7th Cir. 1995); 57 Fed. Reg. 37666, 37674 (Pet. App. 209a-210a).

"window of correction"? What happens when the window closes?

What did the Court intend by its legal conclusion that—

> Under the unique circumstances surrounding Guzy's disciplinary loss of pay, we believe that the department made a one-time deduction, and did not make the disciplinary deduction from Sergeant Guzy pursuant to an established policy (Pet. App. at 10a).

Did this mean that deductions, actually made pursuant to an express authorization which was later amended, were never made "pursuant to an established policy?"

What was intended by the Court's statement that "Finally, [Guzy's deduction] fits within the 'window of correction' express requirement that the deduction be 'for reasons other than lack of work,' because it was imposed as a disciplinary measure[?]" (Pet. App. 10a). Did the Court mean that all disciplinary deduction situations fit within the window of correction, even intentional deductions? None of this is clear.

The Solicitor General's *amicus curiae* opposition to *certiorari* muddies the waters further by dropping the word "*automatically*" from Eighth Circuit language, (*see,* United States' Opposition to *Certiorari* at 6), and stating that "[A]lthough the courts of appeals are not in full agreement on the correct interpretation of the salary basis test, this case does not warrant review, in part, because the position articulated by the Secretary in this case may eliminate uncertainty in the lower courts." Note that the apparent "only actual, always correctable, docking" position of the Eighth Circuit is not the position which the United States goes on to articulate. The position of the Eighth Circuit in this case and that of the Department of Labor under the applicable regulations are clearly not the same.[31] See Appendix B on the recent articulations

[31] The Solicitor General's Brief In Opposition To *Certiorari* apparently supports the Eighth Circuit in this case only on the basis

of the applicable rules by the Solicitor General and Solicitor of Labor.

The Police Board argued in opposition to *certiorari*, that the Eighth Circuit considered and rejected "the argument that a possibility of an improper deduction [on the basis of a subject to rule] alone destroys" exempt status. Is that so? Did the Eighth Circuit so rule, or did it avoid ruling on the simple basis of a claim that, even if the Sergeants or Lieutenant's were non-exempt, they became exempt by operation of the "window of correction?"

IV. ALL PUBLIC EMPLOYEES WHO *AS A PRACTICAL MATTER* ARE SUBJECT TO IMPERMISSIBLE DISCIPLINARY SUSPENSIONS UNDER 29 C.F.R. § 541.5(d) AND § .118(a)(5) ARE COVERED BY THE NATIONAL HOURS OF WORK STANDARD.

The St. Louis Police Sergeants and Lieutenants are not salaried because they are subject to a disciplinary code authorizing suspensions in pay for less than a full pay period on the basis of over 40 non-safety infractions.

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of a misperception of facts. See "The Facts" outlined in the Statement of the Case above. For example, the Solicitor states that "*state law* has provided that St. Louis police Sergeants *receive* a yearly salary." This is inaccurate; the applicable Missouri Statute does not provide that the sergeants will receive anything, it authorizes the Police Board to set compensation up to a stated maximum. (J.A. at 17 and 70). The Solicitor states, based on an understandable misunderstanding (the Solicitor had access to neither the record nor the Joint Appendix at the time) that the Police Board imposed a disciplinary suspension without pay in only one instance. (But *see*, J.A. 49, 57, 60-64, 76, 85.) And, the Solicitor distinguished *Auer* from other cases without knowing that "other factors" in *Auer* do support the hourly status. (J.A. at 48, 64, 76-78, 81 and 87.) Finally, although apparently disagreeing with the Eighth Circuit's application of the "window of corrections," the Solicitor cast aside as not warranting review, the fact that Guzy's deductions were not "inadvertent," that no reimbursement has been made, and that the respondents did "not modify their entire disciplinary code." *See*, Solicitor's Brief at n.9.

The "subject to" rule is tested neither by *merely* theoretic technicalities nor by an absolute requirement of actual deductions. The first alternative might result in inadverent loss of salaried status by lack of employer attention to unintended rules which exist only on paper. The second would limit application of the maximum hours of work standard to rule breakers who are actually suspended.[32]

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[32] A strong majority of eight Circuit Courts of Appeals support a rule which holds that when the employer has an express, unambiguous rule which subjects employees to impermissible disciplimary deductions, the employees are non-salaried for FLSA purposes. These circuits hold that actual deductions are not determinative. *See, Yourman v. Dinkins*, slip. op. 95-7561 (2d Cir. 1996), *cert. pending*; *Balgowan v. New Jersey Dept. of Transportation, slip op. 95-5276 (3d Cir. 1996) vacated on other grounds pending reh'g*; *Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993); *Shockley v. Newport News*, 997 F.2d 236 (4th Cir. 1991); *Klien v. Rush-Presbyterian*, 990 F.2d 279 (7th Cir. 1993); *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991); *Carpenter v. Denver*, 82 F.3d 353 (10th Cir. 1996), *cert. pending*.

The Sixth Circuit is in agreement with this majority holding, but with the clarification that if it is unclear whether the employer has an express policy which would subject the employee to impermissible deductions, or if the policy is ambiguous, then the courts must look to see if an actual deduction has occurred to determine whether the employees are subject to such impermissible deductions. *Michigan Ass'n of Government Employees v. Dept. of Corrections*, 992 F.2d 82 (6th Cir. 1993).

The Eleventh Circuit, which in *Atlanta Firefighters Professional Association v. Atlanta*, 920 F.2d 800 (1th Cir. 1991) previously seemed to support the minority rule requiring actual deductions, has now clarified that a single impermissible disciplinary deduction made pursuant to an express policy is enough to make the entire class of employees non-exempt. *Avery v. Talladego*, 24 F.3d 1337 (11th Cir. 1994).

With the very recent decisions of the Second, Third and Tenth Circuits (see n.26), the shrinking minority only includes the Fifth and Eighth Circuits. However, a careful review of those decisions

The test is more practical than either extreme. It is one fully cognizant of the real work-a-day world. Salaried status is absent whenever employees know that as a practical matter they are subject to disciplinary suspensions for a portion of their work period's compensation.[33] Employees covered by a widely publicized disciplinary code know that they are covered and respond accordingly, whether or not they or their work mates have actually been docked. The very purpose of disciplinary docking rules is to discourage the conduct prohibited.

As a practical matter, St. Louis Police Sergeants are subject to the Police Manual's disciplinary docking code.

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reveals that even those courts do not clearly and consistently apply a strict "only actual deduction" rule.

The Fifth Circuit in *York v. Witchita Falls*, 944 F.2d 236 (5th Cir. 1991) advances an "only actual deduction" rule. However, it has held only that the employees before it were salaried because "it had no evidence before it of either actual deductions *or a policy* of docking pay." *Id.* at 242. Thus, it is not clear how the Fifth Circuit would rule if a clear, express policy authorizing impermissible deductions existed.

Finally, the Eighth Circuit in *McDonnel v. Omaha*, 999 F.2d 293 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 1188 (1994), did state that it was following an "only actual deduction" rule. However, as discussed above, *McDonnel* may be muddled by the Eighth Circuit's ambiguous ruling in this case including its statement that "*[a]rguably*, the department's two-day pay deduction from Sergeant Guzy would *require* him to be treated as a nonsalaried employee." (Pet. App. at 9a). (emphasis supplies).

[33] As stated by Judge Preska, in *Yourman v. Dinkins*, 826 F. Supp. 736, 743 (S.D.N.Y. 1993), *aff'd*, slip op. 95-7561 (2d Cir., May 31, 1996), *cert. pending*—

> "[U]nambiguous material generated by the DOL seems to recognize that actual deductions are unnecessary before the exemption is lost. In its promulgation of [29 C.F.R.] § 541.5d, the DOL declined the suggestion of one commentator [AFSCME] to 'alter[] the regulations to require that an actual deduction of pay occur before the exemption is lost.' 57 Fed. Reg. 37672. The DOL expressly found that requiring an actual deduction was inconsistent with the appropriate focus upon the pay system at issue. 57 Fed. Reg. 37673."

The code authorizes non-safety disciplinary suspensions without pay for less than a work period. "[O]ther factors" tailored their pay to hourly increments—that is, the form in which they earn and lose compensation was, in fact, on an hourly basis. This makes the Sergeants' and Lieutenants' pay contingent and hourly, not guaranteed or salaried. The code commands that they are not in charge of the work place; they do not own their own time.[34]

The *as a practical matter* standard is clearly met where, as here—

(a) a clear disciplinary code unambiguously authorizes impermissible deductions (Pet. App. at 102);

(b) the employer has disavowed neither the code nor its impermissible applications;

(c) the employer's chief executive officer (J.A. at 60-62), the FRCP 30(b)(6) designees (J.A. at 13-14, 49-57 and Respondent's Opp. Cert., App. 3-10), an employer witness who serves as supervisor to the employees (J.A. 76), an internal affairs investigator (J.A. 85), and numerous employees involved all testify that they are "subject to" such docking (J.A. at 63-64, 76, 85, 86-88);

(d) a representative/similarly situated witness was actually docked (Pet. App. at 217a-219a and J.A. at 87);

(e) a second witness testifies to actual deductions (J.A. at 85);

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[34] At the Secretary's urging, the Third Circuit concluded that simply receiving a guaranteed minimum weekly payment does not transform an otherwise hourly employee into a "salaried" one for FLSA purposes. *Brock v. Claridge Hotel & Casino*, 846 F.2d 130 (3d Cir. 1988), *cert. denied*, 488 U.S. 925 (1988). "Salary is a mark of executive status because the salaried employee must decide for himself the number of hours to devote to a particular task. . . . With regard to hourly employees, it is the employer who decides the worth of a particular task. . . ." *Id.*

(f) the employer never affirmatively establishes that the employees are not subject to impermissible disciplinary docking;

(g) the compensation administration of the employee and "other factors" reflect hourly status (J.A. at 3, 4, 6, 11-12, 16, 47, 58, 60-64, 76-78, 81 and 87); and

(h) the employer does not prove, or even claim, that the disciplinary code is either not applicable to the employees, or that it is a mere technical rule or mistake never intended to be used.

It is the potential for reduction that destroys exempt status, especially in the disciplinary code context. The frequency with which deductions, practically authorized, are made from an employee's compensation is not significant; as long as the compensation is subject to deductions, the salary test is defeated. Compensation is fixed and immutable and not subject to deduction, or is it contingent. *Abshire v. Kern County*, 908 F.2d 483 at 487 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991).

The Eighth Circuit's rule—if it is that only actual, "non-idiosyncratic" disciplinary deductions violate the "subject to" rule—would determine exempt status by a group of employees' collective behavior; such a rule means that if a sufficient number of employees violate the disciplinary policy, in sufficiently generic circumstances, and are docked, *all* employees are covered *by* an hours of work standard. *But*, if employees generally abide by the rules so that they are never docked, or are docked only in few or unusual situations, the hours of work standard would be lifted from all. Such a rule is impractical, would make enforcement a quagmire, and must not be adopted. *See, Balgowan v. New Jersey*, Stip. Op. 95-5276 at 11 and 12 (3rd Cir., May 16, 1996), *vacated on other grounds pending rehearing* and *Michigan Ass'n of Government Employees v. Michigan Department of Corrections*, 992 F.2d 82, 86 (6th Cir. 1993).

In a very limited sense, the Eighth Circuit was correct in holding that the "mere possibility of an improper deduction in pay does not defeat an employee's status." For example, a rule "on the books" which is commonly and widely known to be out of use will not defeat a non-exempt status. However, a serious intentional authorization of such improper deductions in the event of violation of an employer's well documented disciplinary code, designed by the employer to apply to all employees in question, which is clearly communicated, well understood, never disavowed, and actually applied *raises* the pall of disciplinary docking *as a practical matter* not only as a "mere possibility." The Eighth Circuit's adoption of the extreme "only actual deduction" rule should not be upheld.

V. THE "WINDOW OF CORRECTION" UNDER 29 C.F.R. § 541.118(a)(6) IS AVAILABLE TO CORRECT IMPERMISSIBLE DEDUCTIONS ONLY IN CASES OF (a) ACTUAL MISTAKE OR INADVERTENCE, (b) RESTORATION OF LOST COMPENSATION UPON DISCOVERY, AND (c) THE COMPLETE REVOCATION OF THE IMPERMISSIBLE RULES.

Guzy's two day suspension clearly was not inadvertent. It was done consciously, while this litigation was pending, and after the salary basis and disciplinary docking rules had been briefed before the district court on summary judgment. Even after its discovery and extensive discussion of the disciplinary docking rule, the Police Board continues to withhold Sergeant Guzy's docked pay, offering to reimburse him *only if required* to do so at the close of this litigation.

The Eighth Circuit held that 29 C.F.R. § 541.118(a)(6) provides a "window of correction" to an employer who revises a small part of the offending code and promises to refund offending deductions *only if ordered to do so by a court*, even in the case of post litigation, non-safety disciplinary suspension for less than a pay period.

The Eighth Circuit fails to place the burden on the employer (1) to establish that actual deductions made were mistaken or inadvertent, (2) to revise all offending portions of the disciplinary code immediately, and (3) to seek out and refund all offending deductions upon discovery. This is contrary to the accepted rule; all three pre-conditions are necessary to the use of the window. See, *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2nd Cir. 1991), *cert. denied*, 506 U.S. 905 (1992); and *Klein v. Rush-Presbyterian-St. Luke's Medical Center*, 990 F.2d 279 (7th Cir. 1993); *see*, Peikes, "Tightening the White Collar Exemptions—the Court Breaths New Life into the Fair Labor Standards Act," 10 *The Labor Lawyer* 121 at 136-40 (1994); and The Thompson Group, *Fair Labor Standards Handbook for State, Local Governments and Schools* (Washington, D.C., 1989, supplemented monthly), § 222 at 32-33; *see also*, DOL's position as outlined in Appendix B.

The Eighth Circuit's ruling would permit an employer to intentionally act in a manner inconsistent with the salarly basis test with impunity. Even after being sued, an employer would be able to take advantage of exemptions to which the employer previously was unentitled. Employers could avoid the application of the FLSA hours of work standard since only a conditional post-litigation promise to reimburse deductions with a promise of limited future compliance would be required.

The regulation at 29 C.F.R. § 541.118(a)(6) requires that an employer's pre-litigation intention is decisive in determining whether the window of correction is available. Disciplinary deductions made pursuant to an established written policy and continued after they are discovered, and even after the initiation of litigation challenging them, necessarily indicates no intention to pay an employee on a salaried basis.

The Eighth Circuit's suggested approach would be to rob the salary basis regulation of any teeth. A stricter

rule is necessary to prevent the incongruous situation of employers cynically undertaking corporate or agency policies which subject the compensation of all white collar employees to reduction for reasons other than lack of work, knowing that exempt status of the affected employees could be restored through a promise of reimbursement in the event of a litigation loss and a promise to reform any limited portion of the rules which are established in litigation to have actually been applied to the challenging litigants. Voluntary compliance with the Act, absent litigation, would face a serious threat by any employer who engaged in the too frequent calculus of the cost of compliance versus the cost of non-compliance. See, Appendix B.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted,

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APPENDICES

APPENDIX A

The Federal Register & The FLSA "Salary Basis" Test

29 C.F.R. part 541.1 through 5. (October 19, 1938) First published without "Salary Basis".

5 Fed. Reg. 4077 (1940). First regulatory annunciation of "Salary Basis."

"Stein Report." October 10, 1940. (J.A. 21).

"Weiss Report." June 30, 1949. (J.A. 36)

19 Fed. Reg. 1321 (1954). Notice of Proposed Rule Making. Incorporating "Salary Basis" rules, but without current disciplinary docking language.

19 Fed. Reg. 4405 (1954). Final "Salary Basis" Rule incorporates current "Salary Basis." Adds Disciplinary Docking Rule In Response to Comments.

"Kantor Report" (March 3, 1958). (J.A. 42).

40 Fed. Reg. 27640 (1975). Adjusts "Salary Levels."

43 Fed. Reg. 3779 (January 24, 1978). Notice of delay in public safety hours of work study under FLSA section 7(k).

44 Fed. Reg. 70589 (December 7, 1979). Announces study on FLSA section 7(k). Averages hours of work for public safety occupations at less than 216 hours in 28 days.

46 Fed. Reg. 3013 (January 13, 1981). Final rule on "Salary Levels" intends increase to be effective February 13, 1983.

46 Fed. Reg. 11972 (February 12, 1981) Final rule on increase "Salary Levels" stayed by new Administration "indefinitely." This continues to today.

48 Fed. Reg. 40518 (1981). Revised FLSA section 7(k) law enforcement work period as a result of *Jones v. Donovan*, Slip Op. 79-2973; 25 W.H. Cases 380 (D.C. Cir. 1981), *aff'd mem.*, 675 F.2d 1340 (D.C. Cir. 1982). Sets 171 hours in 28 days as work period.

50 Fed. Reg. 47696 (1985). Notice of Proposed Rule Making on Part 541. "Indefinite stay" on "Salary Levels" continued.

51 Fed. Reg. 2525 (January 15, 1986). Extension of Comment Period on 29 C.F.R. Part 541 Exemption Rules.

51 Fed. Reg. 13413 (April 18, 1986). Notice of proposed rule making on FLSA in State and Local Agencies, 29 C.F.R. Part 553.

52 Fed. Reg. 2019 (January 16, 1987). Advance Notice of Proposed Rulemaking on rule for State and Local Agencies in 29 C.F.R. Part 553.

52 Fed. Reg. 2032 (1987). Publication of final rules to State and Local Agencies in 29 C.F.R. Part 553.

56 Fed. Reg. 45824-30 (September 6, 1991). Interim Rule on Public Sector "Salary Basis." 29 C.F.R. § 541.5(d) (Pet. App. 86a).

57 Fed. Reg. 37666 (August 19, 1992). Final Rule on Public Sector "Salary Basis." 29 C.F.R. § 541.5(d) (Pet. App. 184a).

59 Fed. Reg. 57130 (November 14, 1994). Regulatory Agency. Announces Delayed Schedule on Part 541 exemption rules.

60 Fed. Reg. 23544 (May 8, 1995). Regulatory Agenda. Republished above nearly verbatim with revised schedule.

60 Fed. Reg. 59608 (November 28, 1995). Regulatory Agenda. Republishes above, edits out "sorely out of date," with revised schedule.

61 Fed. Reg. 23238 (May 13, 1996). Regulatory Agenda. Republishes above. (J.A. 43.)

APPENDIX B

DOL POSITION 1991-1996[1]

1. August 16, 1991. Solicitor of Labor Brief in *Martin v. Malcolm Pirnie*, 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 119 S. Ct. 298 (1992).

Subject To:

"In expressing approval of the Department of Labor regulations and agreement with *Abshire* [], the district court noted that the *Abshire* court 'reject[ed] defendant's argument that employees are salaried because no deductions were actually made. . . . As the district court explicitly stated, 'it is the *potential for reduction that destroys exempt status.*' " at pp. 19-20 (emphasis in original) [See also, p. 23 where DOL argues "subject to" cases are consistent with regulations.]

* * * *

"As the Ninth Circuit noted in *Abshire*, it is 'misleading and irrelevant' to claim that employees whose pay was subject to reduction should be considered salaried because no actual reductions occurred." at p. 36.

Window of Correction:

"The Secretary's position only prevents an employer from using 29 C.F.R. 541.118(a)(6), when the reduction is *not* inadvertent, where, such as here, the reduction is based on a policy of the employer." at p. 30 (emphasis in original).

* * * *

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[1] This appendix collects the position of the Solicitor General and the Solicitor of Labor expressed in briefs filed in the United States Courts of Appeals and this Court between 1991 and 1996.

"The district court's interpretation of the corrective provisions of 29 C.F.R. 541.118(a)(6) circumvents the remedial purpose of FLSA, as it provides an avenue whereby employers may avoid their overtime pay obligations altogether. In this respect, an employer could adopt and continue an hourly basis of compensation until its plan is challenged. Upon receiving a challenge, the employer would wipe out all back wage liability to its employees by claiming 'inadvertence,' converting prospectively to a legitimate salary basis plan, promising to comply with the salary requirements in the future, and reimbursing the few employees who had suffered actual cash deductions." at p. 31. [Court noted so long as such a policy existed it could not be inadvertent.]

* * * *

2. July 16, 1992. Solicitor General's Supreme Court Opposition to *Certiorari* in *Martin v. Malcolm Pirnie*, (No. 91-1748).

Window of Correction:

"In our view, the court of appeals was clearly correct in deciding that a series of deductions made in accordance with written company policy may not be termed 'inadvertent.' . . . The Department's construction helps to 'prevent the incongruous situation of employers cynically undertaking corporate policies which subject the salaries of their professional, managerial and administrative employees to reduction for reasons other than lack of work, knowing that the exempt status of the affected employees would be restored through reimbursement and a promise to comply, if the employer is caught." at pp. 8-9.

* * * *

3. November 27, 1992. Solicitor General Brief in *Martin v. Monks*, 1993 U.S. App. 20610 (6th Cir., 1993).

Subject To:

"Significantly, it is not necessary that actual deductions for partial day absences occur to defeat the salary test." at p. 23.

* * * *

"First, the frequency with which deductions are made from an employee's pay is not significant; as long as the pay plan under which the employee is compensated is subject to impermissible deductions, the salary requirement will be defeated. *See* 29 C.F.R. § 541.118(a); *Malcolm Pirnie, Inc.*, 949 F.2d at 615, 617; *Abshire*, 908 F.2d at 486, 487. Thus, whether or not the deductions made by Monks for partial day absences were frequent or few is not at issue. What is significant is that Monks' pay policy allowed for such deductions, and that they were taken." at p. 25.

Window of Correction:

"In the instant case, any deductions made from Monks' employees' pay as a result of partial day absences were not inadvertent, because the deductions were the result of Monks' policy." at p. 32.

* * * *

4. August 17, 1993. Solicitor of Labor's brief in *Reich v. Pierce*, 1994 U.S. App. Lexis 26194 (6th Cir., 1994).

"FLSA exemptions are to be narrowly construed in order to further Congress' goal of providing broad federal employment protection." p. 14 (citing, *Mitchell v. Lublin, McGaughy & Ass.*, 358 U.S. 207, 211 (1959).

Subject To:

"Numerous courts, including this one, have held that even if the employer never actually makes the deductions, the salary test is not met where the employer maintains a policy which *subjects* the employee's pay to dockings for partial day absences." pp. 17-18.

Window of Correction:

"In addition, the Secretary interprets section 541.118 (a)(6) as only applying where the impermissible pay deductions are inadvertent." at p. 30.

DOL complains that the employer said that he would only reimburse its employees if the Court found a violation existed. The DOL argues that this means the deduction was not inadvertent since the employer still claims he does not need to repay it. at pp. 36-37.

* * * *

5. January 17, 1995. Solicitor of Labor's *amicus curiae* brief in *SEIU v. San Diego*, 35 F. 3d 483 (9th Cir. 1994), *en banc denied, supp. op.*, 60 F.3d 1346 (9th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3484 (January 16, 1996)

Regulatory Deference:

"On August 19, 1992, the Secretary, after following appropriate rulemaking procedures, promulgated a regulation allowing for the section 13(a)(1) exemption to be invoked by public agency employers if the employees are paid on a 'salary basis' in all respects other than that deductions from their pay are required to be taken for absences of less than a day, in accordance with principles of public accountability. *See* 29 C.F.R. 541.5d (57 Fed. Reg. 37,666, 37,677). These modifications, resulting from reasoned changes of position by the Secretary, are entitled to deference. *See, Rust v. Sullivan*, 500 U.S. 173, 186 (1991)." at n.2, in part.

Salary Basis:

"Pursuant to this broad statutory authority, the Secretary promulgated a regulatory 'salary basis' requirement in 1940, 5 Fed. Reg. 4077, and a "salary basis" regulation that fleshed out this requirement in 1954,

19 Fed. Reg. 4405 (codified at 29 C.F.R. 541.118). *See also*, 19 Fed. Reg. 1321 (1954)." at p. 5.

* * * *

"Subjecting an employee's pay to deductions for absences of less than a day, including absences as short as an hour, is completely antithetical to the concept of a salaried employee. A salaried employee is compensated not for the amount of time spent on the job, but rather for the general value of services performed. It is precisely because executives are thought not to punch a time clock that the salary test for bona fide executives [and administrative and professional employees] requires that an employee's predetermined pay not be subject to reduction because of variations in the . . . quantity of work performed —especially when hourly increments are at issue. *Abshire*, 908 F.2d at 486. *See also Brock v. Claridge Hotel and Casino*, 846 F. 2d 180, 184 (3d Cir.), *cert. denied*, 488 U.S. 925 (1988). As the Supreme Court stated, '[T]he FLSA was designed to give specific minimum protections to *individual* workers and to ensure that *each* employee covered by the Act would receive a fair day's pay for a fair day's work and would be protected from the evil of overwork as well as underpay.' *Barrentine v. Arkansas Freight System*, 450 U.S. 728, 739 (1981) (emphasis in original) (internal quotations and footnote omitted).

Moreover, the Secretary's application of the salary basis test to the public sector appeared to be fully consistent with congressional intent. When Congress brought all public employees within the coverage of the FLSA in 1974, provid[ing] that virtually all non-supervisory government employees will be covered, it certainly was aware of the Secretary's salary basis test, which was identical to the regulation the panel determined Congress did not intend to have applied." at pp. 7-8.

* * * *

"The panel stated that since public employers could not satisfy the 'salary basis' test because of their systems of 'public accountability,' *none* could qualify for the 'executive and administrative exemption' prior to September 6, 1991. LEXIS 27705, at *14 (emphasis added). This is simply not true. First, not all public employers are constrained by systems of 'public accountability.' *See* 57 Fed. Reg. 37,666, *passim* (1992). Second, as this Court recognized, '[n]othing in private or public employment law suggests that a 'bona fide executive' must punch a time clock, nor that he must suffer a day-deduction if he is late for work or occasionally uses a small portion of his time to take care of personal necessities. . . .' *Abshire*, 908 F.2d at 489-90. With this observation, this Court was merely recognizing the reality of the public sector work place, where, regardless of the pay systems in existence, certain employees *are* paid on a salary basis and thus *are* properly treated by their employers as exempt, even under the old regulation. *See* 56 Fed. Reg. 45,824, 45,825 (1991) ([M]ost public employers consider otherwise-exempt employees to be exempt, notwithstanding public sector pay systems under which their pay is subject to deductions for absences of less than one day.) *Cf. Hartman v. Arlington County, Virginia*, 720 F. Supp. 1227, 1229 (E.D. Va. 1989) (public employer changed its pay system to come into compliance with salary basis regulation), *aff'd*, 903 F.2d 290 (4th Cir. 1990)." at 12-13.

* * * *

6. January 10, 1996. Solicitor General's Opposition to *Certiorari* in *Wisconsin v. Mueller*, 54 F.3d 1249 (7th Cir. 1995), *cert. pending*, (Case No. 95-586).

Disciplinary Deductions:

"Thus, employees are not paid on a salary basis if they are subject to unpaid disciplinary suspensions

of less than a week's duration as a penalty for infractions of a work rule other than a major safety rule. See *Klein v. Presbyterian-St. Luke's Medical Center*, 990 F.2d 279, 285 (7th Cir. 1993)." at pp. 3-4.

* * * *

"Thus, because he determined that the partial day absence regulations enacted before Congress extended the FLSA to state and local government employers were not efficaciously 'distinguish[ing] exempt from non-exempt public employees,' the Secretary exempted such employees from that rule.

At the same time, however, the Department retained the disciplinary deduction rule contained in 29 C.F.R. 541.118(a). 57 Fed. Erg, 37,674 (1992). The Department concluded that the comments it had received had not provided a 'sufficient basis' for determining 'that public employers are significantly more restricted in the availability of options with respect to employee discipline than private employers. The Department noted that both public and private employers had disciplinary options wholly consistent with the Section 13(a)(1) overtime exemption, such as termination, official reprimands, demotions, and reassignment or restriction of duties." at pp. 6-7.

Notes 15 and 16 explain that the disciplinary deduction rule is a "legislative regulation" deserving of deference and that the rules on the "salary basis test" and "disciplinary deductions" requirements for Section 13(a)(1) are reasonable exercises of DOL's regulatory authority.

". . . the Department's exemption of public employers from another element of the salary basis test—the partial day absence rule, see 29 C.F.R. 541.5d—does not establish that the Department acted unreasonably in deciding not to differentiate between private and public employers with respect to the disciplinary deduction rule.

By contrast, public accountability principles do not require public employers to impose particular forms of discipline, such as unpaid suspensions of less than a week for minor infractions, and such employers have a range of other options for implementing discipline that would allow them to preserve the exemption, should they desire to do so, for particular classes of employees." at pp. 17-18.

* * * *

"The Department's response to comments received during the 1992 rulemaking does not support [the] claim that the Department admitted that using its salary basis test against public employers had been contrary to the intent of Congress. Rather, the Department's response makes clear that it determined that the partial day deduction component of the salary basis test was 'unduly restrictive when applied in the public sector,' and that exemption from that aspect of the salary basis rule was appropriate." at n.18.

* * * *

7. March 4, 1996. Solicitor of Labor's *amicus curiea* Breif in *Jackson v. Kentucky*.

Disciplinary Docking & Window:

"The Secretary also urges reversal of the district court's ruling that the so-called 'window of correction' was applicable in this case, despite the fact that the Commonwealth had an established policy that permitted making disciplinary deductions for less than a week's time for matters not involving infractions of safety rules of major significance, which is clearly inconsistent with the 'salary basis' test." at p.6.

Window of Correction:

". . . the district court's decision that the Commonwealth should be able to avail itself of the 'window of correction even though it has long had a policy which permitted disciplinary deductions to be made to otherwise exempt employees' should not be allowed to stand. The court's ruling would permit public employers to intentionally act in a manner inconsistent with the 'salary basis' test with impunity; even if sued, an employer would still be able to avoid the payment of overtime since only the reimbursement of deductions and a promise of future compliance are required under the 'window of correction.'" at p. 7.

Disciplinary Deductions:

"DOL's decision to leave the disciplinary part of the 'salary basis' test unchanged was a reasonable policy choice made pursuant to the broad charge it was given to define the Section 13(a)(1) exemption criteria.

The mere invocation of the term 'public accountability' does not resolve the matter. As the district court stated 'No compelling public policy reasons make the disciplinary prong of the salary test more problematic for public employers than large-scale private employers. . . . [The district court listed available alternatives earlier cited by DOL] in concluding that 'the comments [to the interim rule] failed to demonstrate that public employers are significantly more restricted in the availability of options with respect to discipline than private employers.'" [citations omitted]. at p. 26.

* * * *

"In the Commonwealth, which challenges the disciplinary part of the 'salary basis' test *only* as it applies to the public sector, refers to statutes dealing with

the discipline of its own employees. Yet an investigation of the disciplinary provisions cited nowhere reveal any mandatory discipline. . . . the district court correctly held that the Secretary acted reasonably by not changing the disciplinary prong . . ." at p. 28 [Contrast this reference to the "non-mandatory" nature of disciplinary rules with the distinction between rules "permitting" but not "requiring" discipline made in the Solicitor General's *amicus* opposition to *certiorari* in *Auer* at 12.]

Window of Correction:

"The window of correction should not be available to an employer who makes impermissible 'salary basis' deductions pursuant to an established policy." at p. 35.

* * * *

"The regulation at 29 C.F.R. 541.118(a)(6) makes clear that an employer's intention to pay on a 'salary basis' is decisive in determining whether the 'window of correction' will be available to an employer. . . . Disciplinary deductions . . . made pursuant to an established policy . . . necessarily 'indicate that there was no intention to pay the employee on a salary basis.'

To allow the 'window of correction' to apply in such a situation would lead to the unintended result that an employer who deliberately made deductions that are inconsistent with the 'salary basis' test, and is then sued as a defendant in an FLSA suit, would still be able to take advantage of the exemption. . . . This Court should reject this suggested approach, the result of which would be to rob the 'salary basis' regulation of any teeth. . . . In context the [applicable sentence of 541.118(a)(6)] can only be read to read to mean that the exemption will not be lost if

the impermissible deduction is 'inadvertent' *and* is made for reasons other than lack of work" so that 'inadvertence' is required before the 'window' may be taken advantage of. . ." at p. 36.